

IN THE

United States Court of Appeals

For the Ninth Circuit

LEON D. URBAN

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S PETITION FOR REHEARING

On Appeal from the District Court of the United States
for the District of Alaska, Fourth Judicial Division.

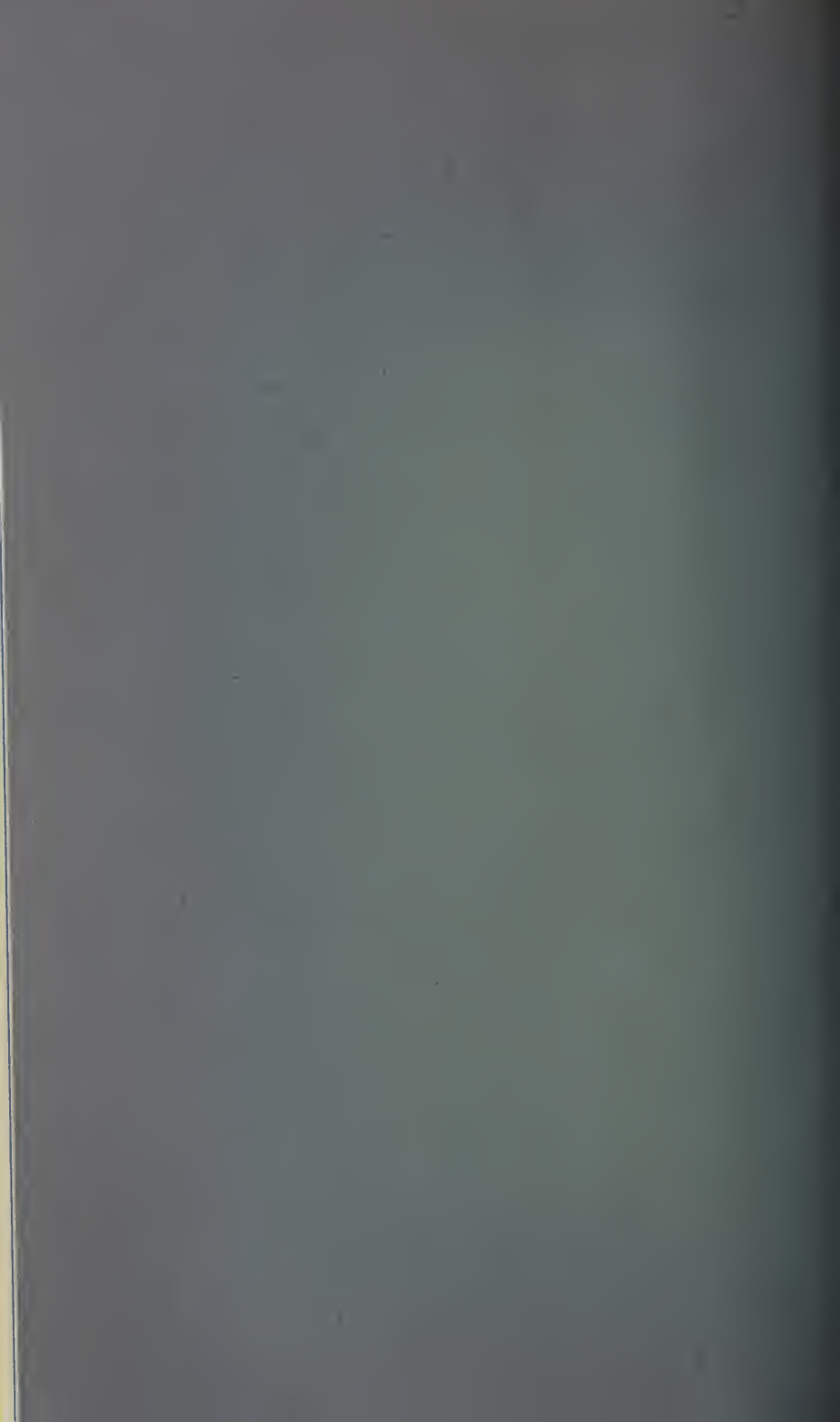
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The appellant, Leon D. Urban, respectfully requests this court to again re-examine the charge to the jury relating to reasonable doubt. Appellant contends that the charge as given was not correct nor adequate and that it conveyed to the jury a confusing concept of reasonable doubt.

STATEMENT

The court instructed the jury on reasonable doubt as follows:

“(14) The law does not require the defendant to prove his innocence, which, in many cases,

might be impossible, but, on the contrary, the law requires the prosecution to establish his guilt by legal evidence and beyond a reasonable doubt.

“The presumption of innocence with which the defendant is, at all times, clothed is not a mere form to be disregarded by you at pleasure. It is an essential, substantial part of the law and is binding on you in this case.

“A reasonable doubt is a doubt based on reason, and which is reasonable in view of all the evidence. And if, after an impartial comparison and consideration of all the evidence, or from a want of sufficient evidence on behalf of the prosecution to convince you of the truth of the charge, you can candidly say that you are not satisfied of the defendant’s guilt, then you have a reasonable doubt. But if, after such impartial comparison and consideration of all the evidence, you can truthfully say that you have an abiding conviction of the defendant’s guilt, such as you would be willing to act upon in the more weighty and important matters relating to your own affairs, you have no reasonable doubt.

“Reasonable doubt is not a mere possible doubt; because everything relating to human affairs, and depending on moral evidence is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding con-

viction, to a moral certainty, of the truth of the charge.”

and on direct and circumstantial evidence as follows:

“15) Two classes of evidence are recognized and admitted in courts of justice, upon either or both of which, if adequately convincing, juries may lawfully find an accused guilty of crime. One is direct evidence and the other is circumstantial. Direct evidence of the commission of a crime consists of the testimony of every witness who, with any of his own physical senses, perceived any of the conduct constituting the crime, and which testimony relates what thus was perceived. All other evidence admitted in the trial is circumstantial, and insofar as it shows any acts, declarations, conditions or other circumstances tending to prove a crime in question, or tending to connect the defendant with the commission of such a [719] crime, it may be considered by you in arriving at a verdict. The law makes no distinction between circumstantial evidence and direct evidence as to the degree of proof required for conviction, but respects each for such convincing force as it may carry and accepts each as a reasonable method of proof. Either will support a verdict of guilty if it carries the convincing quality required by law, as stated in my instructions.”

The appellant requested and was refused an instruction that circumstantial evidence must be consistent with guilt and inconsistent with any other reasonable hypothesis (Tr. 680-681).

ARGUMENT

Appellant is aware that the Supreme Court has held that such an additional instruction on direct and circumstantial evidence is both confusing and incorrect. But the court as ruled that this omission is only the better rule where the jury is properly instructed on the standards of reasonable doubt. *Holland vs. U. S.*, 348 U.S. 121 at 139.

This protection afforded by this additional instruction on circumstantial evidence has found support in many cases.

Gorst vs. U. S., 180 F. 339, 343 (CA 4th Va.)

Anderson vs. U. S., 30 F. (2d) 485-487 (CA 5th Tex.)

Stutz vs. U. S., 47 F. (2d) 1029, 1030 (CA 5th Fla.)

Hanson vs. U. S., 208 F. (2d) 914-916 (CA 6th Ohio)

The removal of this protection to the defendant can only be sanctioned when the accompanying instruction on reasonable doubt is absolutely free from confusion.

The Supreme Court in the *Holland* case *supra* at page 140 clearly expressed what it considered to be the essentials of an adequate definition of reasonable doubt.

The appellant respectfully contends that the court below in its charge on reasonable doubt did not meet those essentials.

The effect of the trial court's instruction was that a reasonable doubt existed if after considering all of the evidence, the jury could *candidly say* that they were not satisfied as to the defendant's guilt. The court's further attempt to define the absence of a reasonable doubt only added to the confusion.

If the word "doubt" is to have any logical meaning in a criminal charge relating to "reasonable doubt," it must be defined to the jury as the type of doubt that makes one hesitate to act in weighty and important matters relating to his own affairs. If reasonable doubt is present, it must make a jury hesitate to convict.

Holland vs. U. S., 348 U.S. 121 at 140

Commonwealth vs. Miller, 139 Pa. 77, 21 A. 138 at 140

The instruction of the court relating to the presence of reasonable doubt only when the jury could not *candidly say* they were satisfied as to his guilt, clearly implies that nothing more than a preponderance of the evidence is required to tip the scales of balance to the absence of reasonable doubt, and guilt.

People vs. Bemmerly, 87 Cal. 117 at 121
25 Pac. 266 at 267-268

The court below instructed the jury that they would not have a reasonable doubt if they had an abiding conviction of the defendant's guilt, such as they would be willing to act upon in more weighty and important matters relating to their own affairs.

Appellant contends that this failure of the court to equate the circumstances for both the presence and the absence of reasonable doubt seriously prejudiced him.

The initial part of the definition of reasonable doubt while defining its presence clearly implies that if something more than a preponderance of the evidence is present, reasonable doubt would be absent. While the latter part of the definition defines the absence of reasonable doubt as an abiding conviction to act in weighty and important matters relating to the jury's own affairs.

Nowhere is the suggestion of the Supreme Court in *Holland vs. United States* followed (*supra* pg. 140).

“He (the trial judge) defined it as ‘the kind of doubt . . . which you folks in the more serious and important affairs of your own lives might be willing to act upon.’ We think this section of the charge should have been in terms of the kind of doubt that would make a person hesitate to act . . . rather than the kind on which he would be willing to act.”

This is also the holding of *Bishop vs. United States*, 107 F. (2d) 297 at 303.

“Reasonable doubt is a doubt arising from the evidence or from the lack of evidence, after consideration of all evidence. It is not a vague, speculative, imaginary something, but just such a doubt as would cause men to hesitate to act upon it in matters of importance to themselves.”

See also

Lovett vs. State, 30 Fla. 142, 11 SD 550,
552-554

Nevada vs. Rover, 11 Nevada 343, 344-350

It was certainly possible for this jury to be *candidly satisfied* of the defendant's guilt, and therefore from the instruction not have a reasonable doubt, and yet, if properly instructed, they might have possessed such a doubt concerning the defendant's guilt, that if they had a similar doubt relating to weighty and important affairs of their own, they would have hesitated to act. Under such circumstances the verdict would have been an acquittal.

Taken as a whole, this charge does not measure up to the essentials laid down by the Supreme Court. This is not a matter of semantics but rather a challenge to this court to define at least for this Circuit a confusion-free instruction on reasonable doubt. This appellant was entitled to such an instruction in this case. For these reasons it is respectfully submitted that the matter be remanded for a new trial.

HALEY & MCINERNEY,
Attorneys for Appellant.

